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ATTORNEYS FOR APPELLANT:

GALEN A. BRADLEY
JOHN H. HALSTEAD
REHANA A. ADAT
Querrey & Harrow
Merrillville, Indiana

ATTORNEYS FOR APPELLEE:

BARRY D. SHERMAN
KRISTEN D. HILL
Barry D. Sherman & Associates
Hammond, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MALLORY HOMOLA,

Appellant-Defendant,

vs.

RICHARD M. HELTON,

Appellee-Plaintiff.

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No. 45A04-606-CV-310

APPEAL FROM THE LAKE COUNTY SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge Presiding
Cause No. 45D04-0410-CT-246

April 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Mallory Homola appeals from the denial of her motions to correct error and for remittitur following a \$40,000 jury verdict in favor of appellee-plaintiff Richard M. Helton in Helton's negligence action against Homola. Specifically, Homola raises the following arguments: (1) the trial court erred in failing to exclude certain medical records and bills that were not produced until after the close of discovery; (2) the trial court erred in failing to exclude testimony from Helton's treating physician; (3) the trial court erred in denying Homola's motion for a continuance; (4) the trial court erred in denying two of Homola's proffered jury instructions; and (5) the jury verdict was excessive. Finding no error, we affirm the judgment of the trial court.

FACTS

On October 25, 2002, Homola and Helton were involved in an automobile accident in Merrillville. The force of the collision propelled Helton's vehicle across an intersection and into a grassy area, breaking the driver's seat and rear windows and bending the vehicle's frame. Helton was taken by ambulance from the scene of the collision to an emergency room, where he complained of a severe headache and pain in his neck and shoulder. He was treated and released.

Four days after the collision, Helton saw his family physician, Dr. Gerard Davidson. At that visit, Helton exhibited diminished mobility of his left arm, left shoulder, and neck. Thereafter, Helton developed pain in his mid-back, lower-back, and knees, numbness in his left thigh, and tingling in his right and left arms. Helton stayed home from work for one

week following the accident to rest in bed. During the second week following the accident, Helton was unable to take part in certain planned family activities.

On November 11, 2002, Helton returned to see Dr. Davidson, complaining of persistent pain in his upper back, shoulder, and neck. Dr. Davidson prescribed a course of physical therapy, which Helton began on November 13, 2002. Helton informed his physical therapist that if he sat for long periods or walked for any distance, he experienced burning in his shoulders, tingling in both arms, and discomfort. Following the completion of physical therapy, Helton sought no further treatment until September 2005.

On October 1, 2004, Helton filed a complaint against Homola, alleging that Homola's negligence caused Helton to sustain damages. At Helton's deposition on May 18, 2005, he attested that he continued to experience "numbness and needles" in his arm and hand every day. Appellee's App. p. A27. He characterized the sensation as a "nuisance" and stated that he did not know of anything else he could do to alleviate the discomfort. Id. at A28. Helton also attested that he experienced numbness in his left thigh within fifteen minutes of laying down in bed or on a couch. Additionally, when Helton sat for forty-five minutes, as he did during his daily commute to work, he experienced a burning sensation in his upper shoulder that worked its way down into his arm, forearm, and hand, which then began to tingle.

On June 23, 2005, the trial court ordered that discovery be completed by January 12, 2006, and set trial for March 13, 2006. In September 2005, Helton returned to see Dr. Davidson for the first time since November 2002. The purpose of the visit was a general physical examination, during which Helton mentioned his continuing neurological

complaints to Dr. Davidson, who ordered an MRI as a result. The October 2005 MRI revealed that Helton had a bulging disc in the cervical spine. Dr. Davidson told Helton that he did not recommend surgery because of the cost, the risk, and the lack of certainty that surgery would fix the problems. Helton did not connect this visit to the ongoing litigation and did not mention the visit or the MRI to his attorneys.

On December 8, 2005, Helton's attorney deposed Dr. Davidson. At the beginning of the deposition, the attorneys for Homola and Helton struck an agreement regarding the use of the deposition:

[Helton's attorney]: Let the record show that this is the Evidentiary Deposition of Dr. Gerard Davidson, and that his testimony may be read into evidence before Court and Jury. Do you agree with that, counsel?

[Homola's attorney]: Yes, no objection.

Appellant's App. p. A74 (emphasis added). During the course of the deposition, both attorneys learned for the first time of Helton's September 2005 visit with Dr. Davidson and of the October 2005 MRI results. Dr. Davidson provided both attorneys with a copy of the MRI report and the report was marked as an exhibit to the deposition.

Following the deposition, Homola served supplemental discovery requests on Helton, seeking copies of the medical records and bills from September and October 2005. Helton requested copies from the providers but did not receive them until after the close of discovery; consequently, Helton provided Homola with the requested records and bills on February 20, 2006, after discovery had closed. The additional bills doubled the amount of special damages sought by Helton, from approximately \$2,500 to approximately \$5,000.

On February 21, 2006, Homola filed a motion to exclude Dr. Davidson's deposition, arguing that Helton had not established that Dr. Davidson would be unavailable at trial, and a motion to exclude the medical records and bills that were produced after the close of discovery. On February 27, 2006, Homola filed a motion to strike the portion of Dr. Davidson's deposition that referred to the September 2005 visit and MRI. On Thursday, March 9, 2006, Homola filed a motion to continue the trial, which was set for the following Monday. On March 10, 2006, the trial court held a telephonic hearing on the pending motions and ultimately denied all of them.

At the jury trial, which began on March 16, 2006, Homola admitted liability, so the only issue at trial was the extent of Helton's damages. Tr. p. 8. At trial, Dr. Davidson's deposition was read into evidence and Helton's September and October 2005 medical records and bills were admitted into evidence, all without objection from Homola. Following the close of trial, the trial court refused two of Homola's proffered jury instructions, concluding that they were covered by other instructions. On March 16, 2006, the jury returned a verdict in Helton's favor in the amount of \$40,000.

On April 4, 2006, Homola filed a motion to correct error, arguing that the trial court erred in refusing to exclude Dr. Davidson's deposition and the September and October 2005 medical records and bills, that the trial court erred in refusing to grant Homola a continuance on the eve of trial, and that the trial court erred in refusing Homola's proffered jury instructions. On April 17, 2006, Homola filed a motion for remittitur, arguing that the jury

verdict was excessive and based upon improper considerations. On May 11, 2006, the trial court denied both motions. Homola now appeals.

DISCUSSION AND DECISION

I. Motion to Correct Error

A. Standard of Review

We review a trial court's denial of a motion to correct error for an abuse of discretion. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances, or reasonable inferences that may be drawn therefrom, that were before the court, or if the decision is without reason or based upon impermissible reasons or considerations. Principal Life Ins. Co. v. Needler, 816 N.E.2d 499, 502 (Ind. Ct. App. 2004).

B. Admission of Medical Bills and Records

Homola first argues that the trial court erred by admitting Helton's September and October 2005 medical bills and records into evidence. Initially, we observe that the decision to admit evidence is within the sound discretion of the trial court. We afford the trial court's determination considerable discretion on appeal, and we will not reverse the trial court's decision unless the appellant can show a manifest abuse of that discretion. Squibb v. State ex rel. Davis, 860 N.E.2d 904, 910 (Ind. Ct. App. 2007).

Homola failed to object when Helton offered these exhibits into evidence at trial. Consequently, she has waived this argument. Fricke v. Gray, 705 N.E.2d 1027, 1030 (Ind. Ct. App. 1999) (holding that to preserve error in the denial of a pretrial motion in limine, party must object at the time the evidence is offered for admission).

Waiver notwithstanding, we observe that it is undisputed that the attorneys for both parties learned, for the first time, of Helton's September 2005 visit to Dr. Davidson at Davidson's December 8, 2005, deposition. A few days after the deposition, Homola served supplemental discovery requests for copies of the records and bills related to the previously-undisclosed visit. It is apparent that Homola knew of the existence of these records before the close of discovery.¹ It is equally apparent that these records were in the possession of third parties over whom neither Helton nor Homola had any control. Although Homola could have requested those records directly from the third-party providers, she chose not to do so. Thus, Homola chose to wait for Helton to make that request. He did so, and produced the documents as soon as he received them from the third-party providers. Under these circumstances, we conclude that the trial court did not abuse its discretion by admitting the documents into evidence.

C. Dr. Davidson's Deposition

1. As Evidence

Homola next argues that the trial court erred by permitting Dr. Davidson's deposition to be read into the record at trial as evidence. In particular, she contends that Helton did not make the required showing that Dr. Davidson was unavailable to testify in person.

¹ Homola insists that she was prejudiced by the late production of the documents because she was unable to name an expert to analyze, and possibly testify, about these documents, inasmuch as the relevant deadline had already passed by the time of Dr. Davidson's deposition. But nothing precluded her from moving for leave to name such an expert or seek such an examination shortly after learning of the records' existence in December 2005. Having failed to do so, she may not now complain of prejudice in this regard.

Helton concedes that he did not establish Dr. Davidson's unavailability, but directs our attention to an agreement between Helton and Homola that removed any necessity for him to do so. At the start of Dr. Davidson's deposition, the following exchange took place between the parties' attorneys:

[Helton's attorney]: Let the record show that this is the Evidentiary Deposition of Dr. Gerard Davidson, and that his testimony may be read into evidence before Court and Jury. Do you agree with that, counsel?

[Homola's attorney]: Yes, no objection.

Appellant's App. p. A74 (emphasis added). Although Homola insists that he agreed only that the deposition would be read into evidence if it were otherwise admissible, it is apparent that, in fact, Homola agreed, without condition, that Dr. Davidson's "testimony may be read into evidence" at trial.² Id. Under these circumstances, Helton was not required to establish Dr. Davidson's unavailability and the trial court properly admitted the deposition into evidence. See Ind. Trial Rule 32(3)(f) (providing that the deposition of a witness may be used "by any party for any purpose" upon agreement of the parties).

2. Portions Relating to September 2005 Visit

Homola next claims that the trial court erred by refusing to strike the portion of Dr. Davidson's testimony that related to Helton's September 2005 visit and October 2005 MRI. In particular, she argues that she was unprepared to cross-examine Dr. Davidson on this topic because she did not know of the appointments prior to the deposition. Initially, we observe that, at the deposition, her attorney was provided with a copy of the MRI report but declined

to cross-examine the doctor about the document at that time. Moreover, we observe that if Homola later concluded that there were additional matters about which she desired to cross-examine Dr. Davidson, she could have sought to obtain a supplemental deposition; in fact, she could have subpoenaed Dr. Davidson to testify at trial. She chose not to, and may not now complain that she was prejudiced by her own failure to question the doctor about the September 2005 appointment.³

Additionally, we again observe that if Homola desired to find an expert witness to analyze and possibly testify about the September 2005 appointment and October 2005 MRI, she should have sought leave from the court to do so. She took no action in that regard. Consequently, the trial court did not abuse its discretion in declining to strike certain portions of Dr. Davidson's testimony.

D. Motion for Continuance

Homola next contends that the trial court erred in refusing to grant her motion to continue the trial date. She argues that she was entitled to a continuance because she did not know of the September 2005 appointment before Dr. Davidson's December 2005 deposition and because Helton did not produce the medical records and bills relating to that appointment until after discovery had closed.

² We also note that, in any event, Homola did not object when Dr. Davidson's deposition was read into evidence at trial. Consequently, she has waived this argument.

³ As noted above, Homola did not object to any portion of Dr. Davidson's testimony when it was read to the jury at trial. Furthermore, she did not object to any question that was asked of the witness. Thus, she has waived this argument.

The decision to grant or deny a continuance is within the sound discretion of the trial court, and we will not reverse that decision unless the trial court has abused its discretion. A trial court abuses its discretion when it reaches a conclusion that is clearly against the logic and effect of the facts or the reasonable and probable deductions which may be drawn therefrom. The denial of a motion for continuance is an abuse of discretion only if the movant demonstrates good cause for granting the motion. Homehealth, Inc. v. Heritage Mut. Ins. Co., 662 N.E.2d 195, 198 (Ind. Ct. App. 1996). The party seeking a continuance must be free from fault and must establish that she suffered prejudice as a result of the denial. Scott v. Crussen, 741 N.E.2d 743, 746 (Ind. Ct. App. 2000).

Here, the record reveals that as of December 8, 2005, Homola was aware of Helton's September 2005 visit to Dr. Davidson and the October 2005 MRI. She requested medical records and bills related to those appointments from Helton but did not request those documents from the providers who had them in hand. She did not seek to name an expert to opine regarding these medical visits.

As of February 20, 2006, Homola had all of the requested documents in her possession. On February 21, 2006, Homola moved to exclude the documents and Dr. Davidson's deposition but did not seek to continue the trial. On February 23, 2006, the parties held a pretrial conference and confirmed that jury selection would take place on March 13, 2006, and that the trial would begin on March 16, 2006. Two full weeks later, on March 9, 2006, Homola filed her motion to continue the trial. By that time, over ninety days had elapsed since she learned of the September and October 2005 treatment. Under these

circumstances, Homola has not established that she is free from fault or that she suffered prejudice as a result of the denial of her motion for a continuance. Thus, the trial court did not abuse its discretion in denying Homola's eve-of-trial request for a continuance.

E. Jury Instructions

Homola next contends that the trial court erred in refusing two of her proffered jury instructions. As we consider this argument, we observe that whether to give a tendered jury instruction is within the trial court's discretion. When addressing a challenge to a trial court's decision not to give a tendered instruction, we consider whether the instruction correctly states the law, is supported by the evidence in the record, and is covered in substance by other instructions. Refusal to give an instruction is not reversible error unless there is a reasonable probability that the substantial rights of the complaining party have been adversely affected. The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Lee v. Hamilton, 841 N.E.2d 223, 229 (Ind. Ct. App. 2006).

1. Instruction Number 5

Homola's proffered Instruction Number 5 reads as follows:

An essential element in a claim for negligence is the requirement of a reasonable connection between the defendant's conduct and the damages which the plaintiff has suffered. The plaintiff's burden may not be carried with evidence based merely on supposition or speculation. Standing alone, evidence which establishes a mere possibility of cause or which lacks reasonable certainty or probability is not sufficient by itself to support a verdict for the plaintiff.

Appellant's App. p. A20. Homola argues that this instruction is necessary because it informs

the jury that proximate cause may not be based on speculation.

The jury was instructed, however, that “[a]n act or omission is a proximate cause of an injury if the injury is a natural and probable consequence of the act or omission.” Appellee’s App. p. A52. The jury was further instructed that “[y]our decision must be based on the evidence and not on guess, speculation, or sympathy.” *Id.* at A58. Finally, the jury was instructed that for the plaintiff to carry his burden, the jury “must be convinced from a consideration of all of the evidence in the case that the issue which a party has the burden of proving is more probably true than not true.” *Id.* at A51. It is apparent, therefore, that the substance of Homola’s proffered Instruction Number 5—specifically, that proximate cause may not be based on speculation—was adequately covered by the remaining jury instructions. Under these circumstances, the trial court properly refused Instruction Number 5.

2. Instruction Number 6

Homola’s proffered Instruction Number 6 reads as follows:

The Court has permitted opinion testimony in this case from one or more experts. You are not required to accept the opinions of an expert simply because he or she is an expert, but are free either to accept or reject the opinion of the expert witness. You should weigh and determine the weight to be accorded the expert’s opinion based on the evidence presented, including the extent of the witness’s experience and expertise, the reliability of the analytical methods employed, the degree of certitude with which the opinion is cast, and the reasonableness of the testimony considered in light of all of the evidence.

Appellant’s App. p. A21. Specifically, Homola insists that this instruction was necessary to inform the jury that it was free to reject Dr. Davidson’s opinion testimony and to consider the

“degree of certitude” with which it was cast. Id.

The jury was instructed that if it was unable to reconcile conflicts in the evidence that it must determine what testimony it believed and what testimony it disbelieved. The jury was also instructed regarding the way to evaluate a witness’s credibility, including considering the reasonableness of the witness’s testimony in light of all evidence. Additionally, the jury was instructed that an expert witness was to be judged in the same manner as any other witness and that the expert’s skill, experience, knowledge, veracity, and familiarity with the facts of the case, in addition to the general rules regarding credibility, should be considered. Finally, the jury was instructed that testimony presented by deposition was to be considered in the same manner as live testimony. Appellee’s App. p. A45, A54, A57. It is apparent, therefore, that the substance of Instruction Number 6 was covered by the remaining jury instructions and that, as a result, the trial court properly denied this instruction.

II. Jury Verdict

Finally, Homola argues that the jury verdict was excessive and that the trial court should have granted a remittitur in the amount of \$25,000. In considering a claim of an excessive jury verdict, we will neither reweigh the evidence nor judge the credibility of witnesses, and will consider only the evidence favorable to the award. A judgment is not excessive unless the amount cannot be explained upon any basis other than prejudice, passion, partiality, corruption, or some other improper element. A damage award must be supported by probative evidence and cannot be based on mere speculation, conjecture, or surmise. Thus, a damage award will be reversed only when it is not within the scope of the

evidence before the finder of fact. Fowler v. Campbell, 612 N.E.2d 596, 603 (Ind. Ct. App. 1993).

Here, Homola emphasizes that Helton requested only \$5,000 in special damages for his medical expenses. She concludes, therefore, that “the only logical explanation” for the jury’s verdict of \$40,000 is that the jury incorrectly concluded that Helton declined to have a \$25,000 surgery based on the cost alone.⁴ Appellant’s Br. p. 27.

There is no support for Homola’s conclusion.⁵ Homola’s true complaint is that the jury placed too great a value on Helton’s general, non-economic, damages. The trial court instructed the jury on three elements of general damages: (1) the nature and extent of Helton’s injuries and the effect of those injuries on his ability to function as a whole person; (2) whether the injuries were temporary or permanent; and (3) the physical pain and mental suffering experienced and reasonably certain to be experienced in the future because of the injuries. Appellee’s App. p. A58. General damages cannot be precisely measured and are properly left to the sound and liberal discretion of the jury. Landis v. Landis, 664 N.E.2d 754, 757 (Ind. Ct. App. 1996).

Here, Helton presented evidence that immediately following the collision, he had a severe headache and pain in his neck and shoulder. Within a few days, his discomfort worsened to include pain in his mid-back, lower back, and knees, numbness in his left thigh,

⁴ Helton declined to have the surgery because of the cost, the risk, and the lack of certainty that surgery would fix his ongoing problems.

⁵ Helton did not request that the jury award any damages for future medical costs; moreover, the jury was not instructed on future medical costs as an element of damages.

and tingling in his right and left arms. He was unable to work for two weeks following the collision and was unable to take part in several planned family activities. Although the worst of Helton's pain abated, he has continued to experience tingling in his right arm and numbness in his left thigh, especially when he sits for longer than forty-five minutes at a time. When Helton commutes to work in his car, he must exercise his hand to "wake [it] up" and, at work and at home, Helton must frequently get up and walk around to allow feeling to return. Tr. p. 55. Dr. Davidson testified that prior to the collision, Helton had no problems with his neck, back, shoulders, hands, arms, or thigh, and that the tingling in his extremities was probably related to the collision. Id. at 22, 30, 44. Helton's condition is permanent.

Given that the evidence supports a conclusion that, for the rest of his life, the tingling and numbness will affect Helton on a daily basis, interrupting his work and home life, and that during the first two weeks following the accident he was unable to work or take part in family activities, we conclude that the jury did not abuse its discretion in awarding Helton \$40,000.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.